

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

KEVIN RAY HOLMES,

Petitioner,

v.

NEVADA DEPARTMENT OF
CORRECTIONS, *et al.*,

Respondents.

Case No. 3:21-cv-00364-MMD-CSD

ORDER

I. SUMMARY

This habeas matter is before the Court on Respondents' motion to dismiss. (ECF No. 11 ("Respondents' Motion").) Also before the Court is Petitioner Kevin Ray Holmes's motion for appointment of counsel. (ECF No. 16 ("Holmes's Motion").) For the reasons discussed below, Respondents' Motion is granted, in part, and Holmes's Motion is denied.

II. BACKGROUND

Holmes challenges a conviction and sentence imposed by the Eighth Judicial District Court for Clark County. *See State of Nevada v. Kevin Ray Holmes*, Case No. C129708.¹ A jury found Holmes guilty of murder of the first degree with use of a deadly weapon (Count I) and attempt murder with use of a deadly weapon (Count II). (ECF No. 12-21.) Holmes appealed and the Nevada Supreme Court reversed and remanded ordering a new trial. (ECF No. 12-36.)

Following re-trial, a jury found Holmes guilty of murder of the first degree with use of a deadly weapon (Count I) and attempt murder with use of a deadly weapon (Count II).

¹The Court takes judicial notice of the online docket records of the Eighth Judicial District Court and Nevada appellate courts. The docket records may be accessed by the public online at: <https://www.clarkcountycourts.us/Anonymous/default.aspx> and at: <http://caseinfo.nvsupremecourt.us/public/caseSearch.do>.

1 (ECF No. 13-10.) On December 7, 1999, the state district court entered a judgment of
2 conviction and sentenced Holmes to life with the possibility of parole plus an equal and
3 consecutive term of life with the possibility of parole for the use of a deadly weapon for
4 Count I as well as 20 years plus an equal and consecutive 20 years for use of the deadly
5 weapon for Count II, to run concurrently to Count I. (ECF No. 13-12.)

6 Holmes appealed and the Nevada Supreme Court affirmed his conviction. (ECF
7 No. 13-28.) In April 2019, Holmes filed a state post-conviction habeas petition alleging
8 that the Nevada Department of Corrections (“NDOC”) has not been properly crediting him
9 for statutory good and work time and/or meritorious award credits. (ECF No. 13-42.) The
10 state district court denied his petition and the Nevada Court of Appeals affirmed in part,
11 reversed in part, and remanded with instructions for the state district court to hold an
12 evidentiary hearing to determine the correct start date for Holmes’s sentence for the
13 attempted murder deadly weapon enhancement and to determine the correct amount of
14 credit that should apply to the maximum portion of that sentence. (ECF Nos. 13-45, 14-
15 17.)

16 On remand, the state district court conducted a telephonic evidentiary hearing
17 concluding that Holmes expired his attempted murder sentence on June 20, 2008, and
18 the attendant deadly weapon enhancement would begin on June 21, 2008. (ECF Nos.
19 14-19, 14-23 at 4-5.) Holmes discharged his underlying sentence for Count II and he was
20 granted parole on the underlying sentence for Count I in 2012. (ECF No. 14-23 at 4-5.)
21 Holmes then argued that NDOC continued to calculate his sentences incorrectly. (ECF
22 No. 14-29.) In October 2020, the state district court found Holmes received the relief as
23 required by the Nevada Court of Appeals Order. (ECF No. 14-27.) Holmes appealed and
24 the Nevada Court of Appeals affirmed the state district court’s decision. (ECF No. 15-15.)

25 In December 2020, Holmes filed another state post-conviction habeas petition.
26 (ECF No. 14-41.) On November 24, 2021, the Nevada Court of Appeals affirmed the state
27 district court’s denial of his second post-conviction habeas petition. (ECF No. 15-35.) In
28 August 2021, Holmes filed a third state post-conviction habeas petition. (ECF No. 15-21.)

1 On November 17, 2021, the state court denied his third post-conviction habeas petition.
2 (ECF No. 15-33.) Holmes appealed and as of the date of this order, his appeal remains
3 pending before the state appellate court. (ECF No. 15-36.)

4 On August 8, 2021, Holmes initiated this federal habeas corpus proceeding *pro*
5 *se.* (ECF No. 1.) Holmes raises seven grounds for relief including claims alleging, *inter*
6 *alia*, denial of due process and equal protection based on the state court's sentencing
7 structure, failure to appoint counsel, and issuance of a new sentence structure without
8 defense counsel or Holmes's physical presence in court. (ECF No. 6.)

9 **III. MOTION TO DISMISS**

10 Respondents move to dismiss Holmes's petition under *Nettles v. Grounds*, 830
11 F.3d 922, 933-34 (9th Cir. 2016). (ECF No. 11 at 11-12.) They further argue that Grounds
12 1 through 6 should be dismissed as not cognizable in federal habeas and Grounds 5 and
13 6 are unexhausted. (*Id.* at 13-22.) In the alternative, Respondents argue that Grounds 5
14 and 6 may be denied on the merits. (*Id.* at 22-23.)

15 **A. Cognizability**

16 The Antiterrorism and Effective Death Penalty Act ("AEDPA") "places limitations
17 on a federal court's power to grant a state prisoner's federal habeas petition." *Hurles v.*
18 *Ryan*, 752 F.3d 768, 777 (9th Cir. 2014) (citing *Cullen v. Pinholster*, 563 U.S. 170, 181
19 (2011)). When conducting habeas review, a federal court is limited to deciding whether a
20 conviction violates the Constitution, laws, or treaties of the United States. 28 U.S.C. §
21 2254(a); *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991). Unless an issue of federal
22 constitutional or statutory law is implicated by the facts presented, the claim is
23 not cognizable in federal habeas. *McGuire*, 502 U.S. at 68.

24 Federal habeas relief is unavailable "for errors of state law." *Lewis v. Jeffers*, 497
25 U.S. 764, 780 (1990). A state's interpretation of its own laws or rules provides no basis
26 for federal habeas relief because no federal question arises. *McGuire*, 502 U.S. at 67-68
27 (federal courts may not reexamine state court decisions on state law issues). A petitioner
28 may not transform a state-law issue into a federal one merely by asserting a violation of

1 due process. *Langford v. Day*, 110 F.3d 1380, 1381 (9th Cir. 1996). See also *Lacy v.*
 2 *Lewis*, 123 F. Supp. 2d 533, 551 (C.D. Cal. 2000) (“Merely adding the phrase ‘due
 3 process’ to state law claims does not transform those claims into federal claims; rather,
 4 they remain state law claims ‘dressed up’ as federal due process claims.”); *Nelson v.*
 5 *Biter*, 33 F. Supp. 3d 1173, 1178 (C.D. Cal. 2014) (same). Generally, matters relating to
 6 state sentencing are not cognizable on federal habeas review. *Christian v. Rhode*, 41
 7 F.3d 461, 469 (9th Cir. 1997) (finding state court’s misapplication of state sentencing laws
 8 does not violate due process to justify federal habeas relief unless petition can show
 9 “fundamental unfairness”); *Miller v. Vasquez*, 868 F.2d 1116, 1118-19 (9th Cir. 1989)
 10 (holding that question of whether a prior conviction qualifies for sentence enhancement
 11 under California law is not cognizable federal habeas claim).

12 **1. Challenges to Sentencing (Grounds 1-6)**

13 Holmes’s claims challenging his sentencing are not cognizable in this federal
 14 habeas action. Although Holmes refers to his constitutional rights to due process and
 15 equal protection of the laws, and the constitutional protection against ex post facto laws,
 16 his claims present no federal question as they plainly hinge on the application or
 17 interpretation of state sentencing law. See *Swarthout v. Cooke*, 562 U.S. 216, 220-22
 18 (2011) (noting that the Supreme Court has “long recognized that a mere error of state law
 19 is not a denial of due process”). The Nevada courts rejected his arguments on state law
 20 grounds. Following remand and telephonic evidentiary hearing, the Nevada Court of
 21 Appeals affirmed the state district court’s decision as follows:

22 On appeal, this court largely affirmed the district court’s order but reversed
 23 its conclusion that NDOC did not err when it failed to run the attempted
 24 murder DWE sentence beginning from when Holmes expired his attempted
 25 murder sentence. This court remanded Holmes’ case to the district court to
 26 conduct an evidentiary hearing to determine the correct start date for the
 27 attempted murder DWE sentence. See *id.* The district court conducted a
 28 telephonic evidentiary hearing and concluded that Holmes expired his
 attempted murder sentence on June 20, 2008, and the attendant DWE
 sentence should begin on June 21, 2008. Holmes has not demonstrated
 that the district court exceeded this court’s previous order. We therefore
 conclude he is not entitled to relief on this claim.

Second, Holmes claims the district court’s order following remand
 entered a new sentence structure beyond that pronounced in Holmes’

1 judgment of conviction, it changed his sentences and increased the amount
 2 of punishment, and the district court did so without ensuring Holmes was
 3 represented by counsel or was physically present. The district court's order
 4 following remand merely brought NDOC's structure of Holmes' sentence in
 5 line with the sentences pronounced in Holmes' judgment of conviction. It
 6 did not alter the sentences imposed in the judgment of conviction or
 7 increase his punishment. Further, Holmes was not entitled to counsel at
 8 such proceeding. See *Brown v. McDaniel*, 130 Nev. 565, 569, 331 P.3d
 867, 870 (2014) ("[T]here is no constitutional or statutory right to the
 assistance of counsel in noncapital post-conviction proceedings. . . .") And
 Holmes does not demonstrate that holding the hearing telephonically was
 error or, if it was, that it affected his substantial rights, see NRS 178.598
 ("Any error, defect, irregularity or variance which does not affect substantial
 rights shall be disregarded."). We therefore conclude he is not entitled to
 relief on this claim.

9 Third, Holmes contends his constitutional rights were violated when
 10 the district court failed to adjust the start date of his murder DWE sentence
 11 to match that of the attempted murder DWE sentence. Holmes was not
 12 paroled from his murder sentence to its attendant DWE sentence until 2012.
 Accordingly, the DWE sentence could not have started in 2008. See 1991
 Nev. Stat., ch. 403, § 6, at 1059 (providing a deadly weapon enhancement
 runs consecutively to the sentence imposed for the substantive offense).
 We therefore conclude he is not entitled to relief on this claim.

13 Fourth, Holmes contends the attempted murder DWE sentence is
 14 the controlling sentence because he spent more time serving that sentence
 15 than he spent serving the murder DWE sentence. This court previously held
 16 that the murder sentence is controlling, see *Holmes v. Nev. Dep't of*
Corrections, Docket No. 78878-COA (Order affirming in Part, Reversing in
 Part and Remanding, July 28, 2020), and that holding is the law of the case.
 See *Hall v. State*, 91 Nev. 314, 315, 535 P.2d 797, 798 (1975) ("The law of
 17 a first appeal is the law of the case on all subsequent appeals in which the
 facts are substantially the same.") We therefore conclude he is not entitled
 18 to relief on this claim.

19 Finally, Holmes contends he has been denied requested documents
 20 necessary to the crafting of a meaningful appeal. Holmes does not identify
 21 the documents he requested and was denied, and he does not explain how
 those documents prevented a meaningful appeal. Further, he does not
 specify any relief he is seeking. We therefore conclude Holmes is not
 entitled to relief on this claim.

22 (ECF No. 15-15.) (footnotes omitted.) This ruling, by a state court on matters of state law,
 23 is beyond the scope of this federal habeas proceeding. See *Estelle*, 502 U.S. at 68; *Lewis*,
 24 497 U.S. at 780.

25 In addition, looking at the possible effect the alleged errors relating to the
 26 calculation of Holmes's sentence, his claims are not cognizable because success on the
 27 merits of his claims would not necessarily lead to immediate or speedier release from
 28 confinement. See *Nettles v. Grounds*, 830 F.3d 922, 935 (9th Cir. 2016). Habeas relief is

not available for “probabilistic claims,” *i.e.*, where success on the claims “*could potentially* affect the duration of confinement” or is “*likely* to accelerate the prisoner’s eligibility for parole.” *Id.* at 933-34 (quotation omitted.) Here, if Holmes were to succeed on the claims at issue, it would mean an earlier parole hearing. Holmes’s response argues that “but for the actions of the respondents [Holmes] would have been considered for parole release in 2018 rather than later in 2022.” (ECF No. 19 at 12.) An earlier parole hearing, however, will not necessarily lead to a petitioner’s immediate or speedier release because the parole board has the authority and discretion to grant or deny parole. *See Wydeven v. Warden, Lovelock Corr. Ctr.*, 238 P.3d 867 (Nev. 2008) (citing NRS § 213.1099(2) (“The decision of whether or not to grant parole lies within the discretion of the parole board and the creation of standards does not restrict the parole board’s discretion to grant or deny parole.”)). Because success on Holmes’s claims would not necessarily lead to his immediate or speedier release, they do not fall in the “core” of habeas. *See, e.g., Gordon v. Premo*, 757 F. App’x 627, 628 (9th Cir. 2019). Accordingly, Grounds 1, 2, 3, and the portion of Grounds 4, 5, and 6 alleging constitutional violations related to sentencing are dismissed as noncognizable.

2. Denial of Appointment of Counsel and Presence at Evidentiary Hearing (Ground 4)

To the extent that Holmes alleges in Ground 4 that the trial court abused its discretion in violation of his constitutional rights for failure to appoint him counsel during the telephonic evidentiary hearing, he nonetheless fails to raise a cognizable federal habeas claim. (ECF No. 6 at 9.) In *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987), the Supreme Court held that the due process clause of the Fourteenth Amendment did not mandate the appointment of counsel for indigent defendants during post-conviction proceedings. *See also Coleman v. Thompson*, 501 U.S. 722, 751-53 (1991). Accordingly, Holmes fails to set forth a cognizable federal habeas claim in Ground 4 to the extent that he alleges he was denied constitutional right to due process of law and right to be represented by counsel when the state court did not appoint counsel during the telephonic

1 evidentiary hearing in his post-conviction proceeding.

2 To the extent that Holmes alleges that the trial court abused its discretion in
3 violation of his constitutional rights for conducting the evidentiary hearing without
4 Holmes's physical presence at the hearing, the Court declines to dismiss this claim as
5 noncognizable in federal habeas. A defendant has a due process right to be personally
6 present in judicial proceedings "whenever his presence has a relation, reasonably
7 substantial, to the fulness of his opportunity to defend against the charge." *Kentucky v.*
8 *Stincer*, 482 U.S. 730, 745 (1987). The defendant's "privilege of presence is not
9 guaranteed when presence would be useless, or the benefit but a show, [but] due process
10 clearly requires that a defendant be allowed to be present to the extent that a fair and just
11 hearing would be thwarted by his absence." *Id.* When there is no indication the defendant
12 could have done or gained anything had he attended the hearing, there is no due process
13 violation. See *United States v. Gagnon*, 470 U.S. 522, 527 (1985) (per curiam). The Court,
14 however, notes that Holmes alleges that he was not physically present for the hearing
15 and the record demonstrates that the state court ordered that Holmes be available
16 telephonically for the hearing. (See ECF No. 14-19.) The Court, nonetheless, denies
17 Respondents' motion to dismiss Ground 4 as noncognizable to the extent Holmes alleges
18 a violation of his due process rights because the state court conducted the evidentiary
19 hearing without Holmes's physical presence at the hearing.

20 **3. Denial of Hearing Transcript (Ground 7)**

21 In Ground 7, Holmes alleges he was denied transcripts of a district court hearing,
22 which were necessary to filing a meaningful appeal. (ECF No. 6 at 15.) Respondents
23 argue that Holmes does not raise a cognizable federal claim in Ground 7. (ECF No. 11 at
24 20.) Although Respondents assert that Holmes's request for transcripts was untimely and
25 that the telephonic hearing may not have been recorded (ECF No. 20 at 11), they do not,
26 however, demonstrate that Holmes fails to assert a cognizable claim for federal habeas
27 relief. If a state creates a system for appellate review as an integral part of the system for
28 finally adjudicating the guilt of a defendant, the procedures must comport with demands

1 of due process and equal protection. See *Evitts v. Lucey*, 469 U.S. 387, 393 (1985). The
 2 failure to provide a criminal defendant with a transcript of the trial court proceedings which
 3 effectively denies him his right to a timely appeal may deprive him of his constitutional
 4 right to due process of law. See *Madera v. Risley*, 885 F.2d 646, 648 (9th Cir. 1989)
 5 (finding state's failure to provide full record of trial may violate defendant's due process
 6 rights and form basis for federal habeas corpus relief). A habeas petition must establish
 7 prejudice from lack of recordation to be entitled to habeas corpus relief. See *id.* at 649.
 8 Accordingly, Holmes asserts a cognizable claim for relief and Respondents' motion to
 9 dismiss Ground 7 is denied.

10 **B. Exhaustion**

11 A state prisoner first must exhaust state court remedies on a habeas claim before
 12 presenting that claim to the federal courts. 28 U.S.C. § 2254(b)(1)(A). This exhaustion
 13 requirement ensures that the state courts, as a matter of comity, will have the first
 14 opportunity to address and correct alleged violations of federal constitutional guarantees.
 15 *Coleman v. Thompson*, 501 U.S. 722, 730-31 (1991). "A petitioner has exhausted his
 16 federal claims when he has fully and fairly presented them to the state courts." *Woods v.*
 17 *Sinclair*, 764 F.3d 1109, 1129 (9th Cir. 2014) (citing *O'Sullivan v. Boerckel*, 526 U.S. 838,
 18 844-45 (1999)). To satisfy the exhaustion requirement, a claim must have been raised
 19 through one complete round of either direct appeal or collateral proceedings to the highest
 20 state court level of review available. See *O'Sullivan*, 526 U.S. at 844-45; *Peterson v.*
 21 *Lampert*, 319 F.3d 1153, 1156 (9th Cir. 2003) (en banc). A properly exhausted claim
 22 "must include reference to a specific federal constitutional guarantee, as well as a
 23 statement of the facts that entitle the petitioner to relief." *Woods*, 764 F.3d at 1129
 24 (quoting *Gray v. Netherland*, 518 U.S. 152, 162-63 (1996)); *Castillo v. McFadden*, 399
 25 F.3d 993, 999 (9th Cir. 2005) (fair presentation requires both the operative facts and
 26 federal legal theory upon which a claim is based).

27 A state appellate court decision on the merits of a claim of course exhausts the
 28 claim. See, e.g., *Comstock v. Humphries*, 786 F.3d 701, 707 (9th Cir. 2015). "In the

1 exhaustion context, the Supreme Court has admonished lower courts that the complete
 2 exhaustion requirement is not intended to ‘trap the unwary *pro se* prisoner.’” *Davis v.*
 3 *Silva*, 511 F.3d 1005, 1009 n.4 (9th Cir. 2008) (quoting *Slack v. McDaniel*, 529 U.S. 473,
 4 487 (2000) (rejecting argument that petitioner should be limited to claims in an initial
 5 federal petition after returning to federal court from state exhaustion proceedings)). “More
 6 generally, the Court has held *pro se* pleadings to a less stringent standard than briefs by
 7 counsel and reads *pro se* pleadings generously, ‘however inartfully pleaded.’” *Id.* (quoting
 8 *Haines v. Kerner*, 404 U.S. 519, 520 (1972) (per curiam)).

9 A claim is not exhausted unless the petitioner has presented to the state court the
 10 same operative facts and legal theory upon which his federal habeas claim is based.
 11 *Bland v. California Dept. of Corrections*, 20 F.3d 1469, 1473 (9th Cir. 1994). “A claim has
 12 not been fairly presented in state court if new factual allegations either ‘fundamentally
 13 alter the legal claim already considered by the state courts,’ or ‘place the case in a
 14 significantly different and stronger evidentiary posture than it was when the state courts
 15 considered it.’” *Dickens v. Ryan*, 740 F.3d 1302, 1318 (9th Cir. 2014).

16 **1. Ground 5**

17 In Ground 5, Holmes alleges he was illegally detained in violation of the prohibition
 18 on double jeopardy. (ECF No. 6 at 11.) Respondents argue that Holmes has not
 19 exhausted his double jeopardy claim alleged in Ground 5. (ECF No. 11 at 22.) Holmes
 20 argues that he asserted such a claim in his opening brief appealing the district court’s
 21 denial of his post-conviction state habeas petition filed in April 2019. (ECF No. 19 at 38.)
 22 The Court finds Holmes sufficiently raised his double jeopardy claim asserted in Ground
 23 5 on appeal to the state appellate court to satisfy exhaustion, despite the state appellate
 24 court’s failure to mention his claim in its opinion. (See ECF No. 136 at 21.) Accordingly,
 25 the double jeopardy claim alleged in Ground 5 is exhausted.

26 **2. Ground 6**

27 In Ground 6, Holmes alleges that the state court approved a “new sentence
 28 structure” in violation of the prohibition against double jeopardy. (ECF No. 6 at 13.)

Holmes did not present this claim to the state appellate courts, and therefore, Holmes's double jeopardy claim as alleged in Ground 6 is unexhausted.

IV. HOLMES'S OPTIONS REGARDING UNEXHAUSTED CLAIM

A federal court may not entertain a habeas petition unless the petitioner has exhausted available and adequate state court remedies with respect to all claims in the petition. See *Rose v. Lundy*, 455 U.S. 509, 510 (1982). A "mixed" petition containing both exhausted and unexhausted claims is subject to dismissal. See *id.* In the instant case, the Court concludes that the double jeopardy claim alleged in Ground 6 is unexhausted. Because the petition contains unexhausted claims, Holmes has these options:

1. He may submit a sworn declaration voluntarily abandoning the unexhausted claim in his federal habeas petition, and proceed only on the exhausted claims;
2. He may return to state court to exhaust his unexhausted claims, in which case his federal habeas petition will be denied without prejudice;² or
3. He may file a motion asking this court to stay and abey his exhausted federal habeas claims while he returns to state court to exhaust his unexhausted claims.

With respect to the third option, a district court has discretion to stay a petition that it may validly consider on the merits. *Rhines v. Weber*, 544 U.S. 269, 276 (2005). The *Rhines* Court stated:

[S]tay and abeyance should be available only in limited circumstances. Because granting a stay effectively excuses a petitioner's failure to present his claims first to the state courts, stay and abeyance is only appropriate when the district court determines there was good cause for the petitioner's failure to exhaust his claims first in state court. Moreover, even if a petitioner had good cause for that failure, the district court would abuse its discretion if it were to grant him a stay when his unexhausted claims are plainly meritless. Cf. 28 U.S.C. § 2254(b)(2) ("An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State").

Id. at 277.

If Holmes wishes to ask for a stay, he must file a motion for stay and abeyance in which he demonstrates good cause for his failure to exhaust his unexhausted claims in

²This Court makes no assurances as to the timeliness of any future-filed petition.

1 state court and presents argument regarding the question of whether or not his
2 unexhausted claims are plainly meritless. Respondents would then be granted an
3 opportunity to respond, and Holmes to reply. Or Holmes may file a declaration voluntarily
4 abandoning his unexhausted claims, as described above. Holmes's failure to choose any
5 of the three options listed above, or seek other appropriate relief from this court, will result
6 in his federal habeas petition being dismissed. Holmes is advised to familiarize himself
7 with the limitations periods for filing federal habeas petitions contained in 28 U.S.C. §
8 2244(d), as those limitations periods may have a direct and substantial effect on whatever
9 choice he makes regarding his petition.

10 **V. MOTION FOR APPOINTMENT OF COUNSEL**

11 Holmes again moves for appointment of counsel. (ECF No. 16.) Nothing in
12 Holmes's renewed request for the appointment of counsel causes the Court to change its
13 decision that the appointment of counsel is unwarranted, as set forth in the Court's prior
14 order denying Holmes's request for the appointment of counsel. (ECF No. 5.) Accordingly,
15 Holmes's renewed request for the appointment of counsel is denied.

16 **VI. CONCLUSION**

17 It is therefore ordered that Respondents' motion to dismiss (ECF No. 11) is granted
18 in part as follows:

- 19 1. Grounds 1, 2, and 3 are dismissed as noncognizable. The portion of Grounds
20 4, 5, and 6 alleging due process and equal protection constitutional violations
21 related to sentencing are dismissed as noncognizable.
- 22 2. The portion of Ground 6 alleging a violation of the prohibition of double jeopardy
23 is unexhausted.

24 It is further ordered that Holmes shall have 30 days to: (1) inform this court in a
25 sworn declaration that he wishes to formally and forever abandon the unexhausted
26 ground for relief in his federal habeas petition and proceed on the exhausted grounds;
27 OR (2) inform this court in a sworn declaration that he wishes to dismiss this petition
28 without prejudice in order to return to state court to exhaust his unexhausted grounds;

1 OR (3) file a motion for a stay and abeyance, asking this court to hold his exhausted
2 grounds in abeyance while he returns to state court to exhaust his unexhausted grounds.
3 If Holmes chooses to file a motion for a stay and abeyance, or seek other appropriate
4 relief, respondents may respond to such motion as provided in Local Rule 7-2. Failure to
5 timely comply with this order will result in the dismissal of Holmes's mixed petition without
6 further advanced notice.

7 It is further ordered that Holmes's motion for appointment of counsel (ECF No. 16)
8 is denied.

9 DATED THIS 15th Day of July 2022.

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12 MIRANDA M. DU
13 CHIEF UNITED STATES DISTRICT JUDGE
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